Supreme Court, U.S.
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No. 00-1953

IN THE

Supreme Court of the United States

ANGELA R. SPELL,

Petitioner,

v.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, ERNEST L. LEWIS, DONAL A. WALSH, D. ROBERTO PAEZ and GEORGE A. KAYSEN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The question presented by petitioner is whether the district court and the Ninth Circuit Court of Appeals erred in holding that attorney error, as a matter of law, is insufficient *per se* as a ground for relief from summary judgment under Federal Rules of Civil Procedure 60(b)(1) and (6). In framing her question, petitioner claims that the Ninth Circuit "explicitly" bans attorney error as a basis for relief, "no matter how egregious." Petition, p. i.

In a sense, there is no "question presented" here, because neither the district court nor the Ninth Circuit made such a sweeping ruling. Rather, the Ninth Circuit, which is fully in line with the majority of other circuits in applying the analysis of *Pioneer Inv. Services v. Brunswick Assoc.*, 507 U.S. 380, 113 S. Ct. 1489 (1993) to attorney-error cases, found no abuse of discretion in the lower court's denial of petitioner's motion for reconsideration, both because the alleged error of which she complains — a "failure" of one of her attorneys, who represented her for a few months during the years of litigation, to conduct additional discovery — was insufficient to merit relief and because the motion for reconsideration merely reiterated the losing legal arguments already rejected by the district court.

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STATEMENT OF THE CASE

This petition arises from an appeal from the denial of a motion for reconsideration of summary judgment under Federal Rule of Civil Procedure Rule 60(b)[1] and thus does not involve a review of the underlying judgment. *Brower v. Director*, 434 U.S. 257, 263 n.7, 98 S. Ct. 556, 560 n.7 (1998). Nevertheless, to give this court a frame of reference within which to view petitioner's arguments, a brief synopsis of the underlying facts follows.

A. Spell Is Dismissed from the Medical School

Petitioner Angela R. Spell entered the School of Medicine of the University of California at Davis, California, in 1991 and was dismissed (for the second and final time) in November of 1996 after the board in charge of such decisions "carefully and deliberately considered [Spell's] entire record . . . and came to the conclusion that she had not demonstrated the personal and academic responsibility necessary to complete the medical school curriculum and to function as a safe and responsible physician." Appendix C-9. The order granting summary judgment to the respondent Regents, Appendix C to the Petition, sets forth the details of Spell's disastrous career as a medical student at C-3 through C-7, and concludes, citing the medical school dean's sworn declaration, that Spell

> . . . had failed three courses, despite numerous postponements of final examinations, had taken a leave of absence, was on academic probation

1. Henceforth, all references to "Rules" will be to the Federal Rules of Civil Procedure, unless stated otherwise.

> for the majority of her medical school career, and by the time she was dismissed the second time, had been "subject to dismissal twice before, dismissed once, and reinstated but still showed the same problems which plagued her earlier."

Appendix C-9.

B. Spell Actively Litigates in Several Forums Both with and without Counsel

The record on appeal demonstrates that Spell actively sought to avenge herself against the university in several forums. She appealed her dismissal through the medical school's system and, when that appeal was denied, decided that the appeals process itself had violated her due process and other rights. She then filed a complaint with the United States Department of Education, Office of Civil Rights, alleging that she had been dismissed in retaliation for "protected activities." In this litigation, Spell was represented by Peter Brixie, Esq., who may also have represented her as a party to the Health Professionals for Fairness and Progress discrimination class action.

On August 14, 1996, Spell filed this action against the Regents and four members of the faculty or administration of the School of Medicine at Davis. The complaint, later amended, set forth nine claims alleging nearly every type of gender, race and disability discrimination in the books plus a First Amendment claim. Appendix C-7 to C-20.

Spell commenced this action *pro se*, and then filed an ex parte request for appointment of counsel which was granted on February 18, 1997. She then turned down offers

of assistance from counsel available through the panel of court-appointed attorneys. As the litigation proceeded, Spell opposed motions brought by the Regents, winning some and losing some, responded to interrogatories and other discovery requests, and amended her complaint after the individually named defendants were dismissed.

After nearly two years of handling this matter *pro se*, Spell retained the Law Offices of John L. Burris, a well-known civil rights firm in Oakland, California. The Burris firm substituted in as counsel on May 30, 1998, and assigned the matter to Miles Washington, Esq. Washington defended Spell throughout her six-day deposition, and attended another deposition.

C. Even after Service of the Summary Judgment Motion, Spell Insists on Being Relieved of Representation against the Court's Advice

After three and one-half months, on August 30, 1998, the Burris firm notified Spell that it wanted to withdraw from her representation, *and Spell apparently agreed*, as shown by a stipulation filed with the court on or about September 22, 1998. Appendices I-1 and J-1. The Burris firm then moved to withdraw pursuant to that stipulation on October 2 – a motion which was denied on October 6, apparently out of the court's concern that Spell should not proceed without representation at that "critical stage of the proceeding." Appendix F-2.

On October 16, six weeks after Spell was first placed on notice that she should find replacement counsel, the Regents filed their motion for summary judgment. Despite the filing of this motion and despite the court's implied recommendation that she not proceed without counsel, Spell

did not retain replacement counsel, but instead went to the opposite extreme, and moved on October 23 to be relieved of her attorney. Appendix E.

Again the court turned down the request with comments about "the difficulty [Spell] may experience in trying to prosecute this lawsuit without counsel." Appendix E-1 n.1. And again Spell ignored the court's advice. She not only did not retain new counsel, she sent a lengthy letter to the court (which is part of the record on appeal) on November 16, practically beseeching it to allow her to fire her attorney, and asserting that she was receiving "a great amount of assistance" from various pro bono attorneys and unnamed others. The court relented and granted Spell's third demand to be relieved of counsel. Appendix D.

D. Spell Opposes the Motion for Summary Judgment *Pro Se*

The court also gave Spell an extension of three weeks until December 7 to file opposition to the pending motion, for a total extension of nearly five weeks from the initial due date. Appendix D. Again, Spell proceeded without retaining counsel.

As discovery had closed, Spell began making use of available mechanisms to reopen it. Her first motion to reopen discovery (and extend it for eight months) was denied on October 28, with the court explaining to Spell exactly what sort of showing she should have made to procure an extension: a showing of good cause, of due diligence before the close of discovery, and of specific reasons for seeking the extension. Appendix E.

Rather than refiling the motion following the roadmap the court provided for her, Spell waited until she filed her opposition to the summary judgment motion on December 7, and then asked for leave to depose four witnesses. Appendix C-1, n.1. The court denied the request for two reasons – an absence of any showing of good cause along the lines spelled out in the October 28 order, and a failure to provide an affidavit showing the particular facts she expected to develop during the requested discovery and how they would preclude summary adjudication, as required by Rule 56(f). Appendix C-I and C-2, n.1.

Even without additional discovery, Spell timely submitted a massive opposition to the motion – 225 pages in all, including her own declaration and 74 pages of testimonials, records and other documents. Summary judgment was granted to the Regents on all claims, several of which were adjudicated as matters of law and others for the absence of evidence sufficient to refute the showing made by the Regents. Appendix C-7 to C-20.

The opinion of the district court showed clear cognizance of the deference it was required to extend to academic decisions (especially those of medical school faculties), citing *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 225, 106 S. Ct. 507, 513 (1985), as follows:

> When judges are asked to review the substance of a genuinely academic decision, . . . they should show great respect for the faculty's professional judgment [and] may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person

> or committee responsible did not actually exercise professional judgment.

The court then concluded that the evidence of Spell's unsatisfactory grades and dismissals were academic decisions that did not depart from accepted academic norms, and that her assertions of discriminatory intent were insufficient to avert summary judgment. Appendix C-10 to C-11.

Spell responded with a motion for reconsideration under Rule 59 (dismissed as untimely and not at issue here) and a motion under Rule 60(b), which consisted of a 65-page legal memorandum, a declaration with two attachments, and 49 other exhibits, for a total of approximately 300 pages.

The court properly denied the Rule 60(b) motion for lack of "newly discovered evidence" which could not have been discovered and produced for the summary judgment motion, noting that the majority of the exhibits submitted predated the date for submission of that motion. Certain of these exhibits were dated as early as September 1, 1989; two others are attached to the Petition as Appendices K and L and are dated April 30, 1997, and March 24, 1998, long before the summary judgment motion was submitted. The court also reminded Spell that, as a *pro se* litigant, she was required to follow the same rules of procedure that govern all other litigants, citing *King v. Ativeh*, 814 F.2d 565, 567 (9th Cir. 1987). Appendix B-3.

As a second basis for denying the motion, the court noted that it merely reiterated the losing arguments raised previously. Appendix B-4.

Her first appeal having been dismissed for failure to pay the filing fee, Spell filed a second notice, and her unsuccessful appeal and petitions for rehearing followed.

REASONS FOR DENYING THE WRIT

A. The Ninth Circuit Is Not in Conflict in its Post-*Pioneer* Rulings on Relief from Attorney Error

The premise upon which Spell bases her petition is false. Spell argues repeatedly that review is needed here because, in its unpublished memorandum opinion, the Ninth Circuit affirmed the denial of her motion for reconsideration

> . . . by invoking a rule of law – that attorney error can ***never*** be the basis for relief under Rule 60(b) from a judgment – that is contrary to this Court's ruling in *Pioneer Inv. Services v. Brunswick Assoc.*, 507 U.S. 380, 113 S. Ct. 1489 (1993). While a majority of the circuit courts have followed *Pioneer* by holding that attorney error ***can*** be a basis for relief, the Ninth Circuit . . . fails to follow *Pioneer* by establishing a *per se* rule that attorney error can never qualify.

Petition, p. 13, bold-face italic emphasis in original. Spell even goes so far as to claim that, in ruling on her motion, the Ninth Circuit banned all relief from attorney error, "no matter how egregious." Petition, p. i. The Ninth Circuit has invoked no such rule, and there is no conflict to merit review.

The case upon which this analysis turns is *Pioneer*, in which this Court examined the circumstances under which an attorney's error in missing a filing deadline may operate

as "excusable neglect" sufficient for discretionary relief under Bankruptcy Rule 9006(b). The Court looked at several other statutory uses of the term "excusable neglect," and found that, "Although inadvertence, ignorance of the rules or mistakes construing the rules do not usually constitute 'excusable neglect,' " the concept is an "elastic" one, sometimes linked to events beyond the movant's control (as with Rule 60(b)), and sometimes not (as with Rule 6(b)). *Pioneer*, 507 U.S. at 392, 394, 113 S. Ct. at 1496, 1498-99.

Then, noting that "Congress has provided no other guideposts," this Court concluded that

> . . . the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include . . . the danger of prejudice [to the other party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

Id., 507 U.S. at 395, 113 S. Ct. at 1498. This Court then held that "an attorney's inadvertent failure to file a proof of claim within the deadline set by the court can constitute 'excusable neglect' within the meaning of the [bankruptcy] Rule." *Id.*, 507 U.S. at 383, 113 S. Ct. at 1492.

In the single sentence of the unpublished memorandum opinion which disposes of this matter on two separate grounds, the Ninth Circuit made no mention of *Pioneer*'s liberality to attorneys who miss deadlines – after all, this is not a deadline case. In fact, the court said no more on the

subject of attorney error than: "The district court did not abuse its discretion in denying Spell's motion for reconsideration because 'attorney error is insufficient grounds for relief under both Rule 60(b)1 and (6),' " and directed the reader to see two cases on attorney error. The court then went on to its second reason for the affirmance, namely, ". . . Spell's Rule 60(b) motion merely reiterated the arguments that she had previously presented. . . ." Appendix A-2. The memorandum opinion does *not* say attorney error is *never* grounds for relief, and the two cases to which it directs the reader make clear that attorney error quite often *can* be grounds for relief.

The first case cited by the court is *Allmerica Financial Life Ins. & Annuity Co. v. Llewellyn*, 139 F.3d 664 (9th Cir. 1998), in which Llewellyn argued that his attorney's failure to plead the affirmative defense of waiver provided a basis for relief under Rule 60(b)(1). The court disagreed – but *not* because attorney error is *never* sufficient for relief. To the contrary, the court conceded freely that Rule 60(b)(1) "gives the district court power to vacate judgments whenever such action is appropriate to accomplish justice." *Id.* at 665, citing *Ackermann v. United States*, 340 U.S. 193, 199-201, 71 S. Ct. 209, 212-13 (1950). However, the court noted that such relief "requires a showing of 'extraordinary circumstances' " and concluded that the failure of counsel to assert an affirmative defense does not constitute a circumstance justifying the extraordinary relief. *Ibid.*

The second opinion cited by the Ninth Circuit is *Engleson v. Burlington Northern Railroad Co.*, 972 F.2d 1038 (9th Cir. 1992), in which appellants argued unsuccessfully that their attorney's error in pleading the incorrect jurisdictional statute justified Rule 60(b) relief.

Again, no sweeping rule is set forth here that attorney error is never a basis for relief, as Spell would have this Court believe. Instead, the Ninth Circuit stressed that "Rule 60(b) provides for extraordinary relief and may be invoked only upon a showing of exceptional circumstances." *Id.* at 1044.

The *Engleson* court noted further that, to qualify for such relief, the movant must demonstrate mistake, inadvertence, surprise or *excusable* neglect, and that "[n]either ignorance nor carelessness on the part of the litigant or his attorney provide grounds for relief . . ." (*id.* at 1043), precisely foreshadowing *Pioneer*'s express statement that "inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect. . . ." *Pioneer*, 507 U.S. at 392, 113 S. Ct. at 1496. The *Engleson* court then concluded that, "in the instant matter, counsel's ignorance of the statute that governs labor law disputes between a railway worker and his or her employer does not constitute excusable neglect." *Id.* at 1044. Such an error is one of law which, as a general rule, does not constitute "excusable neglect," even post-*Pioneer*. *See, e.g., Kyle v. Campbell Soup Co.*, 28 F.3d 928, 931-32 (9th Cir. 1994) (court contrasted "dramatic ambiguity" leading to error in *Pioneer* with the misconstruction of unambiguous rules before it, and found error of law not excusable).

Neither of these two opinions asserts a blanket prohibition against attorney error as a ground for relief under Rule 60(b) – and neither does the opinion at issue. Both opinions admit that attorney error may be a basis for relief, then find that the specific error at bar was not of the type which qualified. The Ninth Circuit has reached such fact-specific holdings in other cases, as well.

In *Reynolds v. Wagner*, 55 F.3d 1426, 1429 (9th Cir. 1995), the Ninth Circuit not only granted relief by applying *Pioneer*'s liberalized reading of "excusable neglect" to an attorney's missing of the deadline for filing a notice of appeal under Federal Rule of Appellate Procedure 4(a)(5), but did so even before this Court made *Pioneer* applicable beyond the bankruptcy context in *Stutson v. United States*, 516 U.S. 193, 116 S. Ct. 600 (1996). The following year, in *Committee for Idaho's High Desert, Inc. v. Yost*, 92 F.3d 814, 825, n.4 (9th Cir. 1996), the Ninth Circuit held that *Pioneer*'s analysis of "excusable neglect" is also applicable to Rule 6(b).

In *Briones v. Riviera Hotel & Casino*, 116 F.3d 379 (9th Cir. 1997), the *pro se* litigant sought relief for "excusable neglect" occasioned by the district court's failure to warn him of the possibility of dismissal (just as Spell blamed the district court, in her appellant's opening brief, for not telling her to submit admissible evidence in opposition to the summary judgment motion). In *Briones*, the first opinion in the Ninth Circuit to apply the equitable test of *Pioneer* to Rule 60(b), the court specifically stated that no *per se* rule denying relief for a failure to comply with court rules can exist after *Pioneer*, and remanded for further proceedings. *Id.* at 382. Nevertheless, the court made clear that neither *Pioneer* nor the Ninth Circuit was invoking automatic relief for every cry of error:

> [In *Pioneer*] the Court noted that "inadvertence, ignorance of the rules, or mistakes construing the rules do not *usually* constitute 'excusable neglect.' " 507 U.S. at 392, 113 S.Ct. at 1496 (emphasis added). Thus, although a late filing will

> ordinarily not be excused by negligence, that possibility is by no means foreclosed.

Ibid., emphasis in original. Utilizing the *Pioneer* approach as discussed in *Briones*, the Ninth Circuit granted relief on an equitable basis in *Bateman v. United States Postal Service*, 231 F.3d 1220 (9th Cir. 2000), where it found the attorney error resulted from negligence, "not from deviousness or willfulness." *Id.* at 1224.

Spell's argument that the Ninth Circuit is in conflict with other circuits in that it disobeys *Pioneer* and imposes a *per se* prohibition on attorney error as a basis for Rule 60(b) relief is just plain wrong. The circuit is fully in line with the majority of circuits, which find neither a blanket prohibition nor a blanket grant of relief, but have adopted *Pioneer*'s equitable analysis and reaffirm the district courts' limited discretion to grant relief "upon such terms as are just." *See, e.g., Robb v. Norfolk & Western Railway Co.*, 122 F.3d 354 (7th Cir. 1997), in which the court stated it was *joining the Ninth Circuit* and seven others in acknowledging that "excusable neglect has a new and broader meaning" in the aftermath of the *Pioneer* decision, but noting at the same time that discretion is not limitless and that "[w]e do *not* hold that *all* late filings by counsel must henceforth be automatically considered 'excusable neglect' for purposes of Rule 60(b)(1)." *Id.* at 361, 362; emphasis in original. There is no conflict here, and no justification for seeking review.

B. Even if a Conflict Existed, this Case Is Not the Appropriate Vehicle for Reviewing or Resolving the Issue

Even if this court were to perceive a discrepancy between the holdings of various circuits with regard to attorney error as a basis for Rule 60(b) relief, *this case is not the appropriate vehicle for reviewing or resolving the issue* for several reasons.

1. This Is Not a "Missed-Deadline" Case

The *Pioneer* holding was extended in *Stutson*, *supra*, in which this Court applied the *Pioneer* view of excusable neglect to a missed deadline for filing an appeal under Federal Rule of Appellate Procedure 4(b). In other words, while the liberal *Pioneer* analysis was no longer limited to the bankruptcy arena, it was still tightly focused on pleas for relief from missed filing deadlines, and was not broadened to cover all instances in which a client is displeased by an attorney's actions.

The five cases cited by Spell at page 14 of the Petition to show the alleged majority view that "attorney error means relief from judgment" are all missed-deadline cases,[2] and the two post-

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2. *Pratt v. Philbrook*, 109 F.3d 18 (1st Cir. 1997) (failure to inform court within 60 days that settlement had unraveled); *Canfield v. Van Atta Buick/GMC Truck, Inc.*, 127 F.3d 248 (2d Cir. 1997) (failure to file papers pursuant to terms of local order); *Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp.*, 843 F.2d 808 (4th Cir. 1988) (default taken after failure to timely answer complaint); *Castro v. Bd. of Ed. of the City of Chicago*, 214 F.3d 932 (7th Cir. 2000) (failure to file scheduled pretrial order); *Cheney v. Anchor Glass Container Corp.*, 71 F.3d 848 (11th Cir. 1996) (failure to timely demand trial de novo after arbitration).

Pioneer cases cited by Spell at pages 16 and 17 to show the allegedly errant behavior of the Fifth and Tenth Circuits in denying relief are also deadline cases.[3] *This matter is not a deadline case*. If Spell wants this Court to resolve a "conflict" in the treatment of missed deadlines, she must look elsewhere for the test case.

2. This May Not Even Be an "Attorney-Error" Case

Despite Spell's angry casting of blame at Miles Washington, Esq., who represented her for a few months during this litigation of nearly three years, this very well may not be an attorney-error case at all.

It has never been shown that anything Washington did or did not do caused the loss of the summary judgment motion, much of which was decided as a matter of law, or of the motions for reconsideration. Spell agreed to his withdrawal from the case at least as early as September 18 or 19, 1998 (Appendix J-1, J-2), and even after service of the summary judgment motion on October 16 and repeated admonitions of the court on October 6 and 28 that she should not be unrepresented, she did not retain replacement counsel. Instead, Spell filed the motions by herself (or perhaps with the assistance of her attorney in the related litigation or one or more of the pro bono attorneys she described to the court as helping her in her letter of November 16). She cannot now blame Washington if her writing style and legal analysis were unpersuasive, or if some of her exhibits were not in admissible format. After all, once the court "relieved" her of Washington as her counsel on November 17 after her third request, he could not have filed papers for her, even if he wanted to.

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3. *Servants of the Paraclete v. Does*, 204 F.3d 1005 (10th Cir. 2000) (failure to timely file notice of appeal); *Bohlin v. Banning Co.*, 6 F.3d 350 (5th Cir. 1993) (failure to timely oppose motion).

At page 9 of her Petition, Spell claims that the district court's ruling denying her motion for reconsideration stated that the "properly authenticated evidence belatedly presented . . . could have been presented in the original opposition to summary judgment," and then argues that it was Washington's error "that caused the failure of presentation in the first place." *This premise is false*. The ruling on the reconsideration motion appears in full at Appendix B, and contains not a single word criticizing Spell's evidence in opposition to the summary judgment motion either as unauthenticated or as inadequate. Instead, the ruling comments only on the evidence submitted on the Rule 60(b) motion – and rejects it as not "newly discovered" as required by that rule. Appendix B-3. The decisions not to submit the documents in opposition to the summary judgment motion and then to attempt to pass them off as "newly discovered" on the Rule 60(b) motion were solely those of Spell.

Spell's chief complaint against Washington is that he did not conduct more discovery, yet there is no reason to hold him responsible for any alleged gaps in discovery. Spell, who chose to proceed *pro se* for more than two years, or throughout most of this litigation, could have sent out document requests or conducted other discovery herself, just as she repeatedly responded to the Regents' discovery requests herself. (After her own six-day deposition, Spell certainly knew how depositions are conducted!) Or Spell could have retained counsel to conduct the discovery for her at any time – especially after August 30 when Washington told her he wanted to withdraw. She did not do so.

Finally, there is no reason to believe that contrary evidence existed which could have defeated the motion, but for Washington's failure to "discover" it. The Regents

provided Spell's entire academic record to the court; that record spoke for itself as the basis for the medical school's decision to dismiss her as one who was unlikely "to complete the medical school curriculum and to function as a safe and responsible physician." Appendix C-9. Depositions of her friends and supporters would not have changed the basic information upon which the medical school made its decision, which was the evidence the district court was *required* to examine to determine whether the deference normally accorded to university administrators – especially medical school administrators – should have been applied here. *See, e.g.*, the reference to the "narrow avenue for judicial review" of academic decisions in *Ewing*, 474 U.S. at 227, 106 S. Ct. at 514.

If this Court wants to review the issue of when attorney error is excusable, it should wait for a case in which a wrongful error actually occurred, was indisputably that of the attorney blamed, and had a prejudicial effect on the case – such as the missed-deadline cases referenced above. This case does not present any such issue.

3. The Decision Must Be Affirmed on the Alternate Basis, in Any Event

Either reviewing this case to scrutinize the district court's handling of a claim of alleged attorney error or, as petitioner asks in the alternative, summarily vacating and remanding would be a pointless exercise, as the standard of review requires an affirmance, in any event. As set forth above, the denial of the motion for reconsideration was affirmed for two reasons, the second of which was that the motion "merely reiterated the arguments that [Spell] had previously presented to the district court." Appendix A-2.

The decision then cited *Maraziti v. Thorpe*, 52 F.3d 252, 255 (9th Cir. 1995), which is relevant here on two points. First, a denial of a Rule 60(b) motion for relief from judgment is reviewed under an abuse of discretion standard. *Id.* at 253; *see also Brower*, 434 U.S. at 263 n.7, 98 S. Ct. at 560 n.7. Secondly, such motions are properly denied when the movant "merely reiterated the arguments . . . already presented to the district court." *Maraziti*, 52 F.3d at 255; *see also Van Skiver v. United States*, 952 F.2d 1241, 1243 (10th Cir. 1991), *cert. den.*, 506 U.S. 828, 113 S. Ct. 89 (1992).

"Mere reiteration" and nothing more is exactly what the district court found in Spell's motion for reconsideration, stating,

> The arguments [Spell] offers in support of her position are essentially restatements of prior arguments. "A motion for reconsideration is not to be used as a means to reargue matters already argued and disposed of" or as an attempt to relitigate "a point of disagreement between the Court and the litigant." *Wave* v. *First Citizen's Nat'l Bank*, 846 F.Supp. 310, 314 n.3 (M.D. Pa.) *aff'd*, 31 F.3d 1175 (3d Cir. 1994).

Appendix B-4.

In addition, the district court found that Spell had not submitted "newly discovered evidence" in support of her motion as required by Rule 60(b), specifically noting that the majority of the affidavits and other documents submitted as "new" predated the December 7, 1998, due date for the earlier summary judgment motion. Appendix B-3; *see* two of these exhibits, dated April 30, 1997, and March 24, 1998, at Appendices K and L.

Spell, who admitted at page 21 of her appellant's opening brief that she decided to withhold the exhibits at issue for "another filing" rather than submit them in opposition to the summary judgment motion, cannot blame anyone else for this decision and, as the district court pointed out, "*pro se* litigants must follow the same rules of procedure that govern other litigants." Appendix B-3, citing *King*, 814 F.2d at 567.

With neither new arguments nor new evidence before it, the district court did not abuse its discretion in denying the motion for reconsideration. *Maraziti, supra*. Because a decision which is correct on any ground may be affirmed (*Giebel v. Sylvester*, 244 F.3d 1182, 1186 (9th Cir. 2001)), the Ninth Circuit was correct in affirming this decision. For that same reason, either accepting this matter for full briefing and review or vacating and remanding for further proceedings would be a pointless waste of this Court's time and resources.

CONCLUSION

Petitioner misstates the unpublished opinion of the Ninth Circuit, claiming that it has invoked a general rule denying any and all relief from attorney error under Rule 60(b), "no matter how egregious," and then argues that this new "rule" places the Ninth Circuit in conflict with the majority of other circuits, which follow the liberal approach for missed-deadline cases established by this Court in *Pioneer*. There is no such "rule" in the Ninth Circuit, and its holdings on attorney error are not in conflict with *Pioneer* or with the majority view. Even if such a conflict had arisen, however, this case would not be the appropriate vehicle for review, as it is neither a missed-deadline case nor a clear attorney-error case at all, and as the standard of review required affirmance on a separate basis, in any event.

Respectfully submitted,

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